



FINANCIAL SERVICES ROUNDTABLE

Via Electronic Submission

Legislative and Regulatory
Activities Division
Office of the Comptroller of the
Currency
400 7th Street SW.
Suite 3E-218
Mail Stop 9W-11
Washington, DC 20219

Barry F. Mardock, Deputy
Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090

Robert deV. Frierson, Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution
Avenue NW.
Washington, DC 20551

Gerard S. Poliquin
Secretary of the Board
National Credit Union
Administration
1775 Duke Street
Alexandria, VA 22314-3428

Robert E. Feldman, Executive
Secretary
Attention: Comments/Legal
ESS
Federal Deposit Insurance
Corporation
550 17th Street NW.
Washington, DC 20429

Re: Loans in Areas Having Special Flood Hazards – Private Flood Insurance

Ladies and Gentlemen:

The Financial Services Roundtable (“FSR”)¹ welcomes the opportunity to submit this letter to the Office of the Comptroller of the Currency, the Board of Governors of the

¹ As advocates for a strong financial futureTM, FSR represents the largest integrated financial services companies providing banking, insurance, payment and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America’s

Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the National Credit Union Administration (collectively, the “Agencies”) on the proposed rule (the “Proposed Rule”) to amend existing regulations regarding loans in areas having special flood hazards to implement the private flood insurance (“PFI”) provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 (the “Act”). The Proposed Rule would implement Section 100239 of the Act, which requires covered regulated lending institutions (“RLIs”) to accept policies that meet the definition of “private flood insurance” under the statute and permits RLIs to accept policies that do not meet the definition on a discretionary basis and subject to certain restrictions.²

In this letter, we first comment on the Agencies’ fundamental approach to requiring RLIs to accept private flood insurance policies that meet certain requirements under the National Flood Insurance Program (“NFIP”). We then comment on areas where we believe the Agencies could make further refinements to their requirements on RLIs for accepting PFI on a discretionary basis. We conclude by commenting on the potential impact of the Proposed Rule on the commercial flood insurance market and flood insurance markets generally.

I. Overview

Before providing our detailed comments, we wish to note a few preliminary observations. The Proposed Rule, which would require RLIs to accept policies that meet the statutory definition of PFI, represents an important step in making sure families, households and businesses have access to flood insurance. Flood insurance is a complex issue involving numerous private sector and government stakeholders, and thus the continued dialogue represented by the Proposed Rule is welcome. However, we believe that the Proposed Rule continues to present obstacles to achieving these laudable objectives in that it creates administrative and compliance obstacles that will make it difficult for RLIs to underwrite loans to PFI protected properties. For example, as we discuss in greater detail in this letter, the Proposed Rule’s requirement for RLIs to accept policies that offer coverage “at least as broad as”³ the coverage provided under a Standard Flood Insurance Policy (“SFIP”) will present practical difficulties that will impede or, in some circumstances, prevent RLIs from underwriting loans to PFI protected properties. Thus, as the Agencies consider our comments, we urge them to consider

economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

² 42 U.S.C. §4012a(b)(7)

³ 42 U.S.C. §4012a(b)(7)(B)

carefully how changes to the regulatory regime can best facilitate the provision of PFI to households and firms in affected areas.

II. Mandatory Acceptance of PFI

A. Definition of PFI

The Proposed Rule would implement the Act which, among other things, establishes the statutory definition of PFI. The Proposed Rule clarifies the meaning of PFI, including the Proposed Rule's requirement that PFI coverage be "at least as broad as" coverage under an SFIP. An insurance policy satisfies this requirement if, at a minimum, the policy: (i) defines the term "flood" to include events defined as "flood" in an SFIP; (ii) covers both the mortgagors and mortgagees as loss payees; (iii) contains the coverage provisions specified in an SFIP; (iv) contains deductibles no higher than the specified NFIP maximum for the same type of property; (v) provides coverage for direct physical loss caused by a flood and may exclude other causes of loss identified in an SFIP, while any additional or different exclusions than those in an SFIP may only pertain to coverage that is in addition to the amount and type of coverage that could be provided by an SFIP; and (vi) does not contain conditions that narrow the coverage that would be provided in an SFIP.

We wish to note our general support for requiring RLIs to accept PFI, and we recognize that the Agencies have limited discretion to alter the definition of PFI set forth in the Act. However, requiring RLIs to accept policies that comport with certain NFIP requirements, such as the requirement that the policy provide coverage "at least as broad as" the coverage provided under an SFIP creates uncertainty for RLIs, which are ill-equipped to parse these criteria and render technical analyses. Uncertainty surrounding the requirements of the standard may also result in inconsistent application. Under the Proposed Rule, such inconsistent application could result in violations for RLIs that fail to recognize and accept policies that meet the statutory definition of PFI. Moreover, an RLI which, in error, accepted a policy that did not meet the statutory definition of PFI would also be in violation and could be subjected to a civil monetary penalty for this mistake.⁴ Given that RLIs are acutely focused on regulatory compliance and potential liabilities stemming therefrom, we urge the Agencies to work with us to craft workable standards that avoid causing a chilling effect on lending.

For these reasons, we call upon the Agencies to refine the "at least as broad as" standard, where possible, in order to provide greater certainty for lenders and policyholders. We recognize that the Agencies are implementing a statutorily prescribed

⁴ Arguably the uncertainty surrounding the definition of PFI could expose lenders to liability if they accept noncompliant policies in error. Similarly, it might also be a violation if a lender fails to accept a complying policy. 81 Fed. Reg. 215, 78066 (November 7, 2016).

construct that is imperfect, and we hope that they will work with all stakeholders to facilitate a legislative solution that better effectuates policy objectives and facilitates transactions.

B. Compliance Aid

In October 2013, the Agencies proposed to add to the flood insurance regulations a safe harbor provision, which would have allowed lenders to rely on a state insurance regulator's written determination that a particular private insurance policy satisfied the rule's definition of PFI. If, based upon the State insurance regulator's determination, a policy did satisfy the definition of PFI, an RLI would be required to accept such policy in satisfaction of the mandatory purchase requirement. At that time, the Agencies sought to include the safe harbor in order to address concerns that many RLIs, especially small institutions, would have difficulty evaluating whether a flood insurance policy meets the definition of PFI. However, the Agencies received comments that the safe harbor provision would create new difficulties for state insurance regulators tasked with determining whether a policy satisfied the Federal statutory definition of PFI. Since then, the Agencies have continued to consider how to best facilitate these determinations by RLIs.

The Proposed Rule includes a revised compliance aid whereby a flood insurance policy that meets certain criteria is deemed to satisfy the definition of PFI and, therefore, must be accepted under the mandatory purchase requirement. The Proposed Rule's criteria under the compliance aid for determining whether a policy meets the definition of PFI are: (i) the policy includes or is accompanied by a written summary demonstrating how the policy meets the definition of PFI for each criterion in the definition; (ii) the RLI verifies in writing that the policy includes the provisions identified by the insurer in its summary and that these provisions satisfy the criteria included in the definition; and (iii) the policy includes an assurance clause reading "this policy meets the definition of private flood insurance contained in 42 U.S.C. §4012a(b)(7) and the corresponding regulation."

While we appreciate and commend the Agencies for continuing to work toward a compliance solution, the Proposed Rule's use of a written summary demonstrating how the policy meets the definition of PFI would levy a significant and undue burden on the insurance industry by imposing extra-contractual obligations on insurers. Such extra-contractual obligations are unfair to insurers who draft policies with the intent of clearly defining their responsibilities within the four corners of their contracts. Extra-contractual language could cause confusion and lead to legal disputes as to the breadth of coverage, and thus could possibly lead to unintended or unwarranted liability on the part of the insurer. Moreover, the policies currently offered by insurers are not drafted so as to mirror an SFIP. Consequently performing the analysis necessary to provide summary and verification, as contemplated under the compliance aid, would require a thorough and

time consuming review. At the same time, amending policies to include the required assurance clause will be administratively complex due to the varying legal, regulatory, and rate-setting regimes across the states where the policies are written. Thus, it will be extremely burdensome for insurers to change their policies to more closely align with an SFIP for purposes of this analysis.

Additionally, we submit that the proposed compliance aid also continues to present considerable difficulties for RLIs, which often lack the technical expertise necessary to review and verify the assurances that would be set out under the Proposal. In order to ensure compliance with the statutory definition of PFI, the compliance aid provision would require a bank or other RLI to step into the shoes of an insurer without the particularized expertise necessary to make these analyses. As a practical matter, it will be difficult for an RLI to act on the basis of these criteria despite the overall intentions of the Act and the Proposed Rule to grow access to private sector flood insurance policies. For these reasons, we urge the Agencies to consider alternatives that would not require an RLI to take action based on making these types of compliance determinations or that would require insurers to provide written summaries demonstrating how policies meet the statutory definition of PFI.

III. Comments on the Discretionary Acceptance of PFI

Although the Act furnishes the definition of PFI for mandatory markets, the clear intent of the Proposed Rule is to also facilitate the development of a discretionary market. Thus, the Proposed Rule outlines criteria for discretionary acceptance including the requirements that: (i) a policy be issued by an insurer licensed, admitted or otherwise approved to engage in the business of insurance by the appropriate state regulator; (ii) the policy cover both mortgagor and mortgagee as loss payees; (iii) provides for cancellation only for reasons permitted by FEMA for an SFIP, in the case of nonpayment, or when cancellation is mandated pursuant to state law; and (iv) PFI coverage be “at least as broad as” or “similar to” the coverage provided under an SFIP.

FSR agrees with the Agencies that promoting the discretionary market is an important and necessary objective. However, because the Proposed Rule’s criteria for accepting PFI policies on a discretionary basis mirrors those of the mandatory market, they effectively limit the discretionary acceptance of PFI to policies that follow the requirements of an SFIP. The result is a discretionary market that very closely resembles a mandatory market and that limits a borrower’s flexibility in contravention of the Proposed Rule’s express purpose to create a separate discretionary market as an alternative to mandatory acceptance. Consequently, these criteria will unnecessarily limit the universe of policies available to lenders and borrowers.

For these reasons, we urge the Agencies to reconsider and reformulate the criteria for discretionary acceptance of PFI to make such criteria more permissive, which will

better facilitate market participation. For example, one potential means of expanding the universe of total policies available in a discretionary market would be to revise the requirement that PFI policies provide coverage “at least as broad as” or “similar to” coverage provided under an SFIP. We suggest that PFI policies providing coverage “comparable to” coverage provided under an SFIP would provide sufficient coverage to consumers and empower RLIs to compare and accept policies without requiring them to step into the shoes of an insurer.

Another potential means of expanding the universe of total policies available in a discretionary market would be to grant lenders broad discretion to accept policies that they have verified are consistent with general safety and soundness principles when taking into account the insurer’s ability to satisfy claims based on the ratings of a recognized insurance company rating organization. Granting lenders broad discretion in making these determinations would result in a flood insurance market that would be more similar to other insurance markets (e.g., casualty insurance), where the lender faces fewer limitations on the policies it may accept.

There are also certain aspects of the Proposed Rule’s discretionary acceptance criteria that we would suggest be slightly tweaked to better reflect the current state of the insurance market. First, we suggest that the criterion that the policy cover both the mortgagor(s) and the mortgagee(s) as loss payees include an exclusion for master policies, such as the homeowner association policies of condominiums or planned unit developments, as lenders secured by individual units are not typically listed as loss payees on such policies. Second, in the third criterion, we suggest that the reference to cancellation being “mandated” pursuant to state law be changed to “permitted” pursuant to state law, as it is atypical for state law to mandate cancellation.

In making these suggestions, we note that the Agencies have already recognized the advantages of being permissive in some circumstances. For example, the Agencies have supported the acceptance of certain non-traditional policies containing coverage that does not satisfy the definition of PFI, such as Amish Aid plans.⁵ Accordingly, we suggest a reexamination of the criteria for discretionary acceptance under the Proposed Rule in an effort to provide more flexibility to both RLIs and insurers and to expand the number of total policies available for discretionary acceptance, thus benefitting

⁵ This proposed exception would permit an RLI to accept a private policy issued by a mutual aid society in satisfaction of the mandatory flood insurance purchase requirement if: (i) the institution’s primary supervisory agency determines that such policy meets the requirements of the Federal flood insurance statutes; (ii) the policy meets the amount of coverage for losses and term requirements contained in the mandatory purchase requirement; (iii) the policy covers both mortgagor and mortgagee as loss payees; and (iv) the RLI determines that the policy provides sufficient protection of the loan secured by the property in a special flood hazard area.

consumers and lenders. We also urge the Agencies to continue to work with us to find the best way to effectuate policy objectives.

IV. Impact of the Proposed Rule on Commercial Lenders and the Insurance Market Generally

Recognizing as important the distinctions between the residential and commercial flood insurance markets, the Agencies explicitly request comment on whether flood insurance policies issued by private insurers covering loans secured by nonresidential properties fundamentally differ from those secured by residential properties. We agree with the Agencies that residential and nonresidential insurance markets are dissimilar and therefore require different approaches. First, the nature of the risks underwritten in the nonresidential market tends to be more varied and idiosyncratic than those underwritten for residential loans. Additionally, the relationship between a nonresidential policyholder and underwriter is distinct from that of a residential policyholder and insurance provider. Often a nonresidential or commercial policyholder has the support of multiple persons reviewing the policy, including review by legal counsel, and is better able to bargain for protections prior to acceptance of the policy.

As such, we also wish to note that the Proposed Rule's requirements would likely impose unnecessary burdens on nonresidential and commercial lenders. We agree with the Agencies that, by virtue of the size and nature of much of the nonresidential and commercial property seeking insurance coverage, the approach to lending in a nonresidential context should be treated differently than in a residential context. In particular, while the specific requirements of the Proposed Rule with respect to the deductibles, exclusions, conditions and cancellations might be appropriate in the context of residential lending, applying such requirements in a nonresidential context may create adverse incentives for RLIs and have a chilling effect on lending. To mitigate this effect, we favor allowing RLIs more discretion in accepting flood insurance policies related to commercial property, consistent with the comments expressed above, which will increase the ability of insurers to develop a wider array of private market options that will be acceptable to lenders and nonresidential policyholders alike.

V. Conclusion

In conclusion, we urge the Agencies to continue to consider the potential impacts of the Proposed Rule on borrowers, insurance providers and insurance markets. Without further refinement, we worry that the Proposed Rule might impose inappropriate regulatory burdens that may reduce the incentives for insurance groups to provide products and services to borrowers related to flood protection. To avoid any unintended harm to borrowers or any unnecessary exposure for taxpayers under the NFIP, we urge the Agencies to continue to work with stakeholders to develop standards that increase the availability and use PFI policies.

For these reasons, we urge the Agencies to continue to carefully examine the requirements of the Proposed Rule and as part of this process, to actively consider and account for stakeholder views. Important regulatory reform should develop through a good-faith dialogue between all interested parties and we greatly appreciate the opportunity to be a part of this ongoing process.

Thank you for considering this letter. If it would be helpful to discuss this matter further, please contact me via telephone at +1 (202) 589-2429 or e-mail at Robert.Hatch@FSRoundtable.org.

Sincerely Yours,

A handwritten signature in black ink that reads "Robert Hatch". The signature is written in a cursive, flowing style.

Robert D. Hatch
Senior Director & Counsel
Regulatory and Legal Affairs
Financial Services Roundtable